F. M. S. REPORTS.

[ORIGINAL CIVIL JURISDICTION]

MURRAY-AYNSLEY, J.

[APPELLATE CIVIL JURISDICTION]

POYSER, C.J., McELWAINE, C.J. (S.S.)

& TERRELL, J.A.

March 6, 1940.

CHE AH AND CHE YANG KELSOM

vs.

CHE AHMAD.

[PERAK CIVIL APPEAL No. 4 of 1940]

Probate and Administration Enactment (Cap. 8), section 94—Administrator—Application for leave to sell land—Contract of sale subject to approval of Court —Higher offer.

The administrator of an estate applied to the Court for leave to sell certain land, which he had verbally agreed to sell at the price of $12,777.50, subject to the approval of the Court. Two of the beneficiaries of the estate brought to the notice of the Court that their solicitor had received an offer of $14,000 for the land.

Held, (by Court of Appeal), that it is not for the Court to consider the interests of the purchaser, who is well aware of the risks he runs in entering into a conditional contract. The duty of the Court is to protect the rights of those interested in the property and it is immaterial that at the time the offer was made the price was a reasonable one.

Cases referred to:—

(1) *Re Haji Fatimah,* 6 F.M.S.L.R. 154.
(2) *In re Cooper & Allen's Contract,* 4 Ch. D. 802.
(3) *Crowly v. Bergtheil,* (1899) A.C. 374.
(4) *Harper v. Hayes,* 45 E.R. 731.
(5) *Angullia's Case,* (1938) 7 M.L.J. 185.
(6) *Lim Yew Soon v. Gan Chye Neo,* 2 F.M.S. L.R. 5.
(7) *In re Thomas. Bartley v. Thomas,* (1911) W.N. 143.

AT TRIAL.

A. N. Kenion for administrator (respondent).

Abdul Wahab for beneficiaries (appellants).

J. L. Woods for purchaser.

Murray-Aynsley, J.—This case gives rise to a difficult point of practice, in regard to which there is no precedent, viz., the attitude the Court should adopt when administrators apply for leave to sell, having made a contract subject to the leave of the Court, and a beneficiary produces a higher offer. Although *prima facie* the duty of the Court is to see that the estate benefits as much as possible, the practical application of this is not simple; if purchasers are liable to be met with offers of this kind when they have entered into a contract for purchase at a reasonable price, no one will want to deal with administrators. This will effect prejudicially, not perhaps these beneficiaries in particular, but beneficiaries in general. In fact administrators would be reduced to selling by auction which is a very unsatisfactory method of disposing of land here. Further these offers after a contract has been concluded may be mere efforts to force the first purchaser to pay more, or if not that, it frequently happens that a person will be willing to offer rather more when once someone else has committed himself, when he would not have made any offer otherwise.

Further when circumstances have caused a rise in values, the purchaser who made an agreement which was reasonable at the time may be cut out, while if there had been a fall in values he would have been bound.

These cases must be treated on their merits. Where the second offer shows that the first agreement was at an inadequate price leave should of course be refused, but where the difference is so slight or is due to a change in values since the agreement approval of which is sought, was made, then I consider that approval should be given to such sale where the Court is satisfied that such agreement was at the time of its making a reasonable and proper one. In the present case I consider that leave should be given to the administrator to sell in accordance with the terms of the agreement. Costs of all parties out of estate.

ON APPEAL:

S. Seenivasagam and *Abdul Wahab* for appellants (beneficiaries).

H. R. Rix for respondent (administrator).

S. Seenivasagam.—The application is under section 94 of the Probate and Administration Enactment. The estate should be realised to the best advantage. The price is not reasonable. There is no independent valuation. A better offer has been made. There is no evidence that the price was reasonable even on the 16th October, 1939. The Court must see that the beneficiaries are protected:

Re Haji Fatimah[1].

In re Cooper & Allen's contract[2].

Crowly v. Bergtheil[3].

The appeal has been brought on principle which applies to future sales of property belonging to the estate.

I ask for a sale by public auction at a reserve of $14,000 and will undertake to offer this sum.

H. R. Rix.—I agree that it is the duty to obtain the best price possible, but only on the date of the bargain. The purchaser has bound himself, and the Court has a duty to him. It is no part of the duty of an administrator to try to get out of a fair bargain once he has made it.

Harper v. Hayes[4].
Angullia's case[5].
Lim Yew Soon v. Gan Chye Neo[6].

Poyser, C.J.—I have read the judgment of Terrell, J.A. I agree with it, and have nothing to add.

McElwaine, C.J. (S.S.)—At the close of the hearing of this appeal I was disposed to dismiss it because, there being no suggestion of fraud or sharp practice in making the contract to sell to Tan Tong Hock for $12,777.50, I thought it unfair that he should be bound by his contract if the value of the land fell between the date of his contract and the date when the matter came before the Judge for approval, but should not have the benefit of his contract if the value had risen between those dates.

I was impressed by a passage of the Lord Chancellor in *Harper v. Hayes*[4], at page 548–9 "The Vice-Chancellor seems to have been much influenced by the undertaking of Harper, when the cause stood for hearing, to bid £7,000. But I must say that I think the decree of the Court ought to be determined by the statement of facts when the contract of sale was entered into between Hayes and Pearson, or, at any rate, when the bill was filed, and then there had been no offer "above £6,000."

But on reading this case I find that the trustee had obtained the concurrence of all the *cestuis que* trust to the sale for £6,000.

A case more like the present is *In re Thomas. Bartley v. Thomas*[7], where after an order approving the contract had been made, but not passed and entered, an offer of a higher price had been made. Warrington, J., ordered the property to be put up for auction on an undertaking from the person offering the higher price that he would start the bidding at that price.

In making a contract subject to the approval of the Court Tan Tong Hock must have appreciated that he ran the risk of being bound to pay $12,777.50 if the Judge did not think the property worth more or of having his contract disapproved if it were found that the property had a higher value when the matter came before the Judge.

For these reasons I concur with the other members of the Court in allowing this appeal.

Terrell, J.A.—Under the provisions of section 94 (iv) of the Probate and Administration Enactment an administrator has to make an application to Court if he wishes to sell the immovable property of the deceased. This procedure is different to that of the Colony where an administrator can sell at his own discretion for the purpose of realisation of the estate, provided that such sale takes place within six years of the death. After six years an administrator in the Colony is also required to obtain the sanction of the Court. There are also analogous cases, both under the English practice and that of the Colony, where application to Court is made in the course of the execution of trusts, or to enforce an equitable security. In these latter cases the sale is usually directed to be by public auction (*see* Order 51, r. 3) though the Court has power to direct a sale altogether out of Court under Order 51, r. 1A or to confirm a conditional contract (*see Daniell's Chancery Practice,* 8th Ed., pp. 970 and 971).

In all these cases the duty of the Court is to protect the rights of the parties who have an interest in the property to be sold, and it is a matter for the discretion of the Judge whether the sale should be by public auction or whether the Court is satisfied that, in a private sale, the highest price can be obtained. Where in an application under the Federated Malay States procedure all the beneficiaries are *sui juris* and have consented the Court will be entitled to assume that the price offered is the best obtainable.

I cannot accede to the argument put forward by Mr. Rix on behalf of the respondent, the administrator, that the Court must consider the interests of the proposed purchaser under the conditional contract. A purchaser under these conditions is perfectly well aware that his contract has to be approved by the Court before it can be carried into effect, and he takes the risk of losing his bargain if a better offer is obtained before the approval of the Court is given, or of being held to his bargain if, for any reason, there has been a fall in the value of the land between the date of his offer and the date of the order confirming the contract.

In the present case the intestate died in October, 1937. Letters of administration were granted in October, 1938, and the present application was made in October, 1939. There is no reason to suppose that the administrator did not consider the offer of $400 per acre which he received on the 20th October, 1939. to be a fair one, but he only expressed his own opinion on the value of the property, which is rubber land within three miles of Ipoh, and possibly with a potential building value. The Court was not therefore assisted with an independent valuation.

Before the application was heard two of the beneficiaries, the present applicants, brought to the notice of the Court that their solicitor had received an offer of $14,000 as against the sum of $12,777.50, which was the price in the conditional verbal contract for which the Court's approval was asked. The learned Judge approved the conditional contract, being satisfied that at the time the offer was made the price was a reasonable one. As I have said above, I do not consider that that is the correct line of approach, the first duty of the Court being to protect the interests of the estate.

The learned Judge seems also to have thought that the effect of the later offer may have been to induce the original purchaser to increase his offer. If so, I cannot see that that is any objection. In analogous applications in Singapore the original purchaser frequently increases his offer, and the precedent books contain forms of order approving conditional contracts so varied (*see Seton* Vol. I, p. 326).

On the appeal Mr. Seenivasagam for the appellants asked that the sale should be by public auction at a reserve of $14,000, and he undertook on behalf of another client to make a bid of, at all events, $14,000 when the auction took place. In these circumstances I feel no doubt that it is the duty of the Court to make the order for which the applicants have asked. The appeal therefore should be allowed and the order of the Court below set aside. As, however, the administrator has not acted unreasonably in supporting a contract which he made good in faith with the prospective purchaser, the costs of both parties should be taxed as between solicitor and client and paid out of the estate

The deposit should be repaid to the appellants.

Appeal allowed. Order that property be sold by public auction subject to a reserve price.

[ORIGINAL CIVIL JURISDICTION]

GORDON-SMITH, J.

April 13, 1940.

THEIVANAI ACHI (f.)

vs.

M. M. KATHIRASEN CHETTIAR, M. R. A. L. ALAGAPPA CHETTIAR, P. V. D. P. R. R. M. P. R. PERIAKARUPPAN CHETTIAR.

[SELANGOR CIVIL SUIT No. 68 of 1939]

Limitation Enactment (Cap. 18), section 16—Article 86—Dissolution of partnership by death—Lapse of time before appointment of representative—Limitation of suit for account—Computation of time.

The plaintiff sued for partnership accounts as administratrix of P. R. M. N. Narayan Chettiar, deceased. In April, 1927, deceased had entered into the partnership with the three defendants. He died intestate on the 29th February, 1932, and letters of administration were granted to the plaintiff on the 22nd August, 1938. For the defence it was alleged that the partnership was dissolved in 1932 by the death of the deceased, and therefore the suit was barred under Article 86 of the Limitation Enactment.

Held [following Cussen, J., in **Abdul Majeed v. Official Administrator**(1)] that in the application of section 16 (i) of the Limitation Enactment the test is—"Could the deceased, if alive have brought the suit? If the answer is yes, the section applies; if the answer is no, it does not apply".

Held further, that the right to demand accounts of partnership is inherent in a partner. He can always exercise such right and sue for accounts whether or not he also seeks dissolution. Such right accrues from day to day and descends to the personal representative of a deceased partner. The period elapsing between the date of death and the date of appointment of a representative therefore does not count by reason of section 16 (i) of the Limitation Enactment.

Case referred to:—

(1) *Abdul Majeed v. Official Administrator* (1938), F.M.S.L.R. 242; 8 M.L.J. 267.

PARTNERSHIP ACTION.

Hum Yam Teh for plaintiff.

F. G. Charlesworth for defendants.

Gordon-Smith, J.—At the conclusion of the hearing of this suit I gave a verbal decision in favour of the plaintiff, allowing her claim and the case was then followed by Civil Suit 78/39 which was by the same plaintiff and against the Firm P.R.M.S.T. and not against the three individual partners as in the earlier case. I reserved judgment in this second case and as both suits are somewhat inter-related I have thought it desirable to record in writing the reasons for my decision in the earlier case in addition.